Sea Crest Construction Corp. and Peter Scalamandre & Sons, Inc., Joint Employers *and* Ian Henry. Case 2–CA–31219

January 31, 2000

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND BRAME

On June 2, 1999, Administrative Law Judge D. Barry Morris issued the attached decision. The Respondents filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondents filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order[2] as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondents, Sea Crest Construction Corp. and Peter Scalamandre & Sons, Inc., Joint Employers, Freeport, New York, their officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 1(b).

"(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

[1] The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We adopt the judge's finding that the Respondents have not sustained their burden of showing that Charging Party Ian Henry directed a profane statement at a supervisor. In so finding, the judge cited *National Telephone Directory Corp*., 319 NLRB 420, 422 (1995). There, the Board noted that it has, on occasion, resolved conflicting testimony, such as that provided by Project Superintendent Flaherty and Henry in this instance, against the party that has the burden of proof on the basis of the preponderance of the evidence. The Board stated:

> In [*Blue Flash Express*, 109 NLRB 591 (1954)], two witnesses gave conflicting testimony concerning crucial events. The trial examiner found nothing in the demeanor of either witness or their testimony that would enable him to determine the credibility issue, and therefore attached equal weight to both witnesses and found that the preponderance of the evidence did not support the alleged violation. The Board adopted a similar finding of an administrative law judge in *Central National Gottesman,* 303 NLRB 143, 145 (1991). [Footnote omitted.]

We also note that of the three incidents in November 1997 where Henry allegedly directed profanity at Michael Flaherty there were witnesses to only one of these incidents, and their testimony did not corroborate Flaherty's testimony regarding Henry's alleged use of profanity.

[2] We shall modify the judge's recommended Order to conform with the language in his notice.

Susannah Z. Ringel, Esq., for the General Counsel.
Robert M. Ziskin, Esq. and *Suzanne H. Ziskin, Esq.,* of Commack, New York, for the Respondents.

DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge. This case was heard before me in New York City on December 12 and 13, 1998, and February 17, 1999. On a charge filed on January 30, 1998, a complaint was issued on September 3, alleging that Sea Crest Construction Corp. and Peter Scalamandre & Sons, Inc. (Respondents) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). Respondents filed an answer denying the commission of the alleged unfair labor practice.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally, and file briefs. Briefs were filed by the parties on April 23, 1999.

On the entire record of the case, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent Sea Crest, a New York corporation, with an office and place of business in Freeport, New York, operates as a general construction contractor in the New York metropolitan area. Respondent Scalamandre has provided Sea Crest with employees who perform construction work at the jobsite. Respondents have admitted that they are joint employers performing work at the jobsite. Respondents admit, and I so find, that they are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In addition, it has been admitted, and I find, that Local 157, District Council of New York City, United Brotherhood of Carpenters and Joiners of America, AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

A. The Facts

1. Background

Respondents are carpentry contractors at the renovation site of the Manhattan Psychiatric Center on Ward's Island, New York. They are members of an employer association, which has a contract with the District Council of New York City. During the relevant period, Michael Flaherty was project superintendent, Glenn Phillip and Maximo Rodriguez were carpenter foremen at the site and Nick Zagami was project manager.

Henry's Discharge

Ian Henry worked as a carpenter for Respondents from early June 1997[1] until he was discharged on November 21. He was the shop steward. While Henry testified that he was "general steward," I credit Flaherty's testimony that there was no such title with the Union. In June there were approximately 10 carpenters at the jobsite. This increased to approximately 28 carpenters in August.

[1] All dates refer to 1997 unless otherwise specified.

When Henry first started, his steward duties took from 45 to 60 minutes per day. His steward duties later increased by another 30 to 45 minutes. At various times Rodriguez told Henry that he would have 1 hour to "take care of union business." Henry responded that sometimes he required more than 1 hour to tend to union affairs. In mid-October, Flaherty told Henry that matters were "getting out of hand" and that he would allow Henry "one hour in the morning to walk the job, to see our men, to discuss anything you need to discuss with them at that time."

In June, Henry spoke to Phillip, complaining that the dust masks were inadequate. Phillip replied that it was "really not his concern." In July, Henry spoke to Rodriguez about the masks and Rodriguez told him that "he would see what he could do." I credit Flaherty's testimony that Respondents always provided dust masks. They were located in the shanties and gang boxes. However, they were "daily use" masks. Henry testified that Rodriguez provided masks, but that they were "single use" masks. When Henry spoke to Flaherty in the fall about getting other masks, Flaherty told him that they were "expensive."

On November 6, Frank Ufert, an OSHA representative, appeared at the jobsite. A meeting took place in which Ufert, Henry, and Flaherty attended. Henry told Ufert that he tried to get dust masks for the carpenters "but I had been having a difficult time getting them."

On November 12, the carpenters engaged in a work stoppage. Henry testified that they did so because of the "lack of adequate respiratory protection." I credit Henry's testimony, that after the men dispersed, Flaherty told him that "I was not making things easy for him; I was not cooperating with him." Flaherty testified that the carpenters said that they wouldn't work until they were provided new masks with two elastic bands. He credibly testified that he arranged for the new masks to be delivered shortly thereafter.

On November 21, Henry was discharged. In a letter to the Union explaining the discharge, Flaherty stated:

> 1. On numerous occasions it was explained to Mr. Henry that he would be permitted to walk the jobsite between 7 and 8 A.M. to conduct his union business. Mr. Henry's repeated response to this direction is that his employer has no right to dictate how long he can walk the jobsite.
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> 2. When Mr. Henry felt it was appropriate to work, his production was minimal, if non-existent.
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> 3. .Mr. Henry's belligerent attitude towards authority is unacceptable. He has continually threatened to bring my foremen as well as myself up on charges for simply requiring him to work with his tools.

Discussion and conclusions

At various times during Henry's employment at Respondents he complained about the adequacy of the dust masks. On November 6 an OSHA inspection took place. Henry complained to the OSHA representative about the masks. On November 12 the carpenters engaged in a work stoppage because of the "lack of adequate respiratory protection." After the men dispersed, Flaherty told Henry that he was not "making things easy." Henry was discharged soon thereafter. I find that the General Counsel has made a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in Respondents' decision to discharge Henry. Under *Wright Line,* 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the burden shifts to the employer to demonstrate that the "same action would have taken place even in the absence of the protected conduct." I believe that Respondents have not satisfied this burden.

In Respondents' letter dated November 21, listing the reasons for Henry's discharge, it was stated that Henry was only permitted to engage in his steward duties for 1 hour per day, from 7 to 8 a.m. The collective-bargaining agreement provides that Respondents must provide "reasonable time" for the steward to perform his union duties. In June, when there were 10 carpenters at the jobsite, it took Henry from 45 to 60 minutes per day to perform his duties. In August, the number of carpenters increased to 28. Henry credibly testified that his steward duties increased by another 30 to 45 minutes. I believe that restricting Henry to 1 hour to perform his union duties did not allow for "reasonable" time as required by the collective-bargaining agreement. In addition, Respondents maintain that Henry had no right to visit other contractors at the jobsite. Flaherty testified that he told Henry, "I'll allow you one hour in the morning to walk the job." When asked whether that 1 hour was restricted to dealing with Respondents' employees and whether Henry was instructed not to visit other contractors, Flaherty did not say that he told Henry that he could not visit other contractors. Instead, Flaherty testified, "I told him he had an hour to deal with his union issues."

The November 21 letter also states that Henry's production was "minimal." I credit Henry's testimony that he completed all of his assignments. The daily production reports do not list the names of the carpenters, but rather only the number of carpenters assigned to particular duties. I find that Respondents have not sustained their burden of showing that Henry's production was "minimal."

In addition, the November 21 letter states that Henry threatened to bring charges because he was required to wear his tools. I credit Henry's testimony that he told Rodriguez that he would bring him up on charges "not for asking me to work with my tools," but instead for "not allowing me to take care of union business on their job." This, Henry had the legal right to do.

While not one of the three enumerated points in the November 21 letter, Respondents maintain that Henry used profanity when addressing a supervisor. Thus, Flaherty testified that several times Henry told him "[Y]ou can go f—yourself." Henry denied cursing at any supervisor or foreman. The testimony was clear, however, that profanity was used at the jobsite. I find that Respondents have not sustained their burden of showing that Henry directed a profane statement at a supervisor. See *National Telephone Directory Corp.,* 319 NLRB 420, 422 (1995).

Accordingly, I find that Respondents have not sustained their burden of showing, pursuant to *Wright Line,* supra, that the "same action would have taken place even in the absence of the protected conduct." Therefore, Respondents violated Section 8(a)(1) and (3) of the Act by discharging Henry on November 21.

CONCLUSIONS OF LAW

1. Respondents are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging Ian Henry for his protected activities, Respondents have engaged in an unfair labor practice within the meaning of Section 8(a)(1) and (3) of the Act.

4. The aforesaid unfair labor practice constitutes an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondents have engaged in an unfair labor practice, I shall order Respondents to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Having unlawfully discharged Ian Henry, I shall order Respondents to offer him full reinstatement to his former position, or if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings that he may have suffered from the time of his discharge to the date of Respondents' offer of reinstatement. Backpay shall be computed in accordance with *F. W. Woolworth Co.,* 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondents, Sea Crest Construction Corp. and Peter Scalamandre & Sons, Inc., Freeport, New York, their officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Discharging employees for activities protected by Section 7 of the Act.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Ian Henry immediate and full reinstatement to his former position, or if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges and make him whole for any loss of earnings with interest, in the manner set forth in the remedy section of this decision.

(b) Within 14 days from the date of this Order, remove from their files any reference to the unlawful discharge, and within 3 days thereafter notify Henry in writing that this has been done and that the discharge will not be used against him in any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at their facility in Freeport, New York, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondents' authorized representative, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents have gone out of business or closed the facility involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since November 21, 1997.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge our employees for engaging in activities protected by Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Ian Henry full reinstatement to his former position, or if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges, and WE WILL make him whole for any loss of earnings he may have suffered, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge and WE WILL, within 3 days thereafter, notify Henry in writing that this has been done and that the discharge will not be used against him in any way.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."